Supreme Court, U.S.
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No. 06-122

IN THE

Supreme Court of the United States

MIKE H. SAMADI,

Petitioner,

v.

MBNA AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to the Federal Arbitration Act, the district court properly honored the Delaware choice of law provision in the parties' revolving credit card agreement and, pursuant to settled statutory and case law authority, correctly enforced the agreement's mandatory arbitration requirement.

CORPORATE DISCLOSURE STATEMENT

Respondent MBNA America Bank, N.A., has the following parent corporation:

Bank of America Corporation

The only publicly held corporation that owns 10% or more of Respondent's stock is:

Bank of America Corporation

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	8
A. The Eleventh Circuit's Decision Does Not Conflict With Any Decision of This Court or of Any Other Court of Appeals	8
B. Most of the Issues Listed in Samadi's Petition Have Been Waived Due to Samadi's Failure to Raise Them Below	10
C. In Any Event, the Eleventh Circuit's Decision Was Correct	10
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases

Anderson v. United States, 966 F.2d 487 (9th Cir. 1992) 12

Bank One, N.A. v. Coates, 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff'd mem.*, 34 Fed. Appx. 964 (5th Cir. 2002) 9

Blanchard v. MBNA America Bank, N.A., No. 05-81, 2005 U.S. Dist. LEXIS 18450 (W.D.N.C. Aug. 9, 2005) 9

Edelist v. MBNA America Bank, 790 A.2d 1249 (Del. Super. Ct. 2001) 9, 13

Grasso v. First USA Bank, 713 A.2d 304 (Del. Super. Ct. 1998) 9

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) 8

Hagner v. United States, 285 U.S. 427 (1932) 12

Jaimez v. MBNA America Bank, N.A., No. 05-2478, 2006 U.S. Dist. LEXIS 7526 (D. Kan. Feb. 27, 2006) 9

Joseph v. MBNA America Bank, N.A., 148 Ohio Ct. App. 3d 660, 775 N.E.2d 550 (2002) 9

Cited Authorities

Page

Judge v. Am. Motors Corp., 908 F.2d 1565 (11th Cir. 1990) 11

Kerr v. McDonald's Corp., 427 F.3d 947 (11th Cir. 2005) 12

Konst v. Florida East Coast Ry., 71 F.3d 850 (11th Cir. 1996) 12

Kurz v. Chase Manhattan Bank USA, N.A., 319 F. Supp. 2d 457 (S.D.N.Y. 2004) 9

Lloyd v. MBNA America Bank, N.A., 27 Fed. Appx. 82 (3d Cir. 2002) 9

Mackey v. MBNA America Bank, N.A., 343 F. Supp. 2d 966 (W.D. Wash. 2004) 9, 13

Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000) 9, 13

Meckel v. Continental Resources Co., 758 F.2d 811 (2d Cir. 1985) 12, 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 8

Nationwide Logistics, Inc. v. Condor Transp., Inc., 606 S.E.2d 319 (Ga. Ct. App. 2004) 11

Cited Authorities

Page

Nikwei v. Ross School of Aviation, Inc., 822 F.2d 939 (10th Cir. 1987) 12

Powell v. Nevada, 511 U.S. 79 (1994) 10

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 8

Samadi v. MBNA America Bank, N.A., 178 Fed. Appx. 863 (11th Cir. 2006) 1, 7, 8

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 8

Sunseri v. Macro Cellular Partners, 412 F.3d 1247 (11th Cir. 2005) 14

Wells Fargo Bus. Credit v. Ben Kozloff, Inc., 695 F.2d 940 (5th Cir. 1983) 12

Wisniewski v. United States, 353 U.S. 901 (1957) 10

Youakim v. Miller, 425 U.S. 231 (1976) 10

Statutes and Rules

9 U.S.C. § 2 ..... 1, 8

15 U.S.C. § 1601, *et seq.* 5

15 U.S.C. § 1681, *et seq.* 5

Cited Authorities

	Page
15 U.S.C. § 1692, *et seq.*	5
28 U.S.C. § 1254(1)	1
DEL. CODE ANN. tit. 5, § 952(a)	11
GA. CODE ANN. § 7-5-4(c)	11
GA. CODE ANN. § 7-6A-1, *et seq.*	5
Federal Rule of Civil Procedure 43(e)	14

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20-23) is not reported in the Federal Reporter but is available at 178 Fed. Appx. 863 (11th Cir. 2006). The opinion of the district court (Pet. 59) and the Magistrate Judge's Report and Recommendation (Pet. 70-77) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 21, 2006. The petition for writ of certiorari was filed on July 20, 2006. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

This case involves the Federal Arbitration Act ("FAA"), which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

INTRODUCTION

There are no "compelling reasons" to grant the petition for writ of certiorari. The Eleventh Circuit's decision followed established Supreme Court and Eleventh Circuit precedent, and is also consistent with rulings from other jurisdictions in similar cases. There is no circuit split, nor any important unsettled federal question. Simply stated, there is nothing certworthy about this case.

STATEMENT OF THE CASE

Respondent MBNA America Bank, N.A.[1] ("MBNA") cannot accept Petitioner's statement of the case (entitled "Background and Facts") because it mischaracterizes the evidence and contains statements and conclusions not supported by the record. Accordingly, MBNA submits the following statement of the case.

MBNA is a national banking association that, among its other businesses, issues credit cards. (R1-17, Affidavit of Margaret Simpkins at 2, ¶¶ 2, 3). MBNA's principal offices are in Delaware. (Simpkins Aff. at 2, ¶ 2). In 1996, MBNA issued a credit card to Petitioner Mike H. Samadi ("Samadi"), who is a Georgia resident. (Simpkins Aff. at 2, ¶ 3; R1-1-2, ¶ 9). The terms of use and operation of the credit card and related credit card account were governed by a Credit Card Agreement ("Agreement"). (Simpkins Aff. at 2, ¶ 3).[2] Samadi

1. The true respondent in interest in this case is, and has always been, MBNA America Bank, N.A., which has been incorrectly identified as MBNA America, Inc. (*See* R1-3-1 (identifying correct name in MBNA's answer)).

2. A copy of the Agreement is attached to the Simpkins Affidavit as Exhibit 1.

admits that he entered into the Agreement with MBNA (Affidavit of Mike Samadi, attached to R1-22 and R1-23, at 1 (hereinafter "Samadi Aff.")), and has never disputed that he is bound by the original terms of the Agreement.

The Agreement states that it is made in Delaware and governed by the laws of Delaware. (Simpkins Aff., Ex. 1 at 8 (hereinafter "Agreement at __")). The Agreement requires all litigation to be brought in a court located in Delaware. (Agreement at 8). It also states that the cardholder agrees to the terms of the Agreement when the cardholder uses the credit card. (Agreement at 1). On the back of each MBNA credit card, including all credit cards issued to Samadi in 1996 and thereafter, is a statement that by using the credit card, the cardholder agrees to the terms contained in the Agreement. (Simpkins Aff. at 2, ¶ 4). Samadi used the credit card and account after receiving the Agreement. (*See, generally*, account statements attached to R1-1 (Complaint)). The Agreement states that MBNA may amend the Agreement "by complying with the applicable notification requirements of federal law and the laws of the State of Delaware." (Agreement at 6).

On or about December 20, 1999, MBNA, through its agent, mailed to Samadi written notification that MBNA was amending the Agreement, effective February 1, 2000. (Simpkins Aff. at 2, ¶ 5). In addition to other changes, the notice of amendment ("Amendment") added an "Arbitration Section" that includes a mandatory arbitration provision ("Arbitration Provision"). (Simpkins Aff., Ex. 2 at 1-2 (hereinafter "Amendment at __"); Simpkins Aff. at 2, ¶ 5). The Amendment was sent to cardholders in a separate mailing, not as part of cardholders' monthly account statements. (Simpkins Aff. at 2, ¶ 5).

MBNA maintains records of the names and addresses of its cardholders. (Simpkins Aff. at 3, ¶ 7). MBNA updates this information when the cardholder notifies MBNA of a change. (*Id.*). When mail sent by MBNA to the cardholder is returned by the United States Post Office as undeliverable, a notation is entered in the customer record. (*Id.*). From at least March 1999 through May 2000, MBNA's records showed Samadi as residing at 372 Annie Laurie Drive in Grovetown, Georgia, and MBNA sent Samadi's account statements to this address. (*Id.* at 4, ¶ 10). MBNA's records do not show that account statements mailed to that address were returned as undeliverable. (*Id.*). During this time period, Samadi received account statements that were mailed to that address. (R1-1, Ex. G at 1, 2). The Amendment was mailed to Samadi at the same address to which MBNA mailed Samadi's account statements during this period. (Simpkins Aff. at 4, ¶¶ 10, 11). Samadi used the credit card after the Amendment was mailed to him. (R1-1, Ex. G at 3).

The Amendment provided that cardholders would be permitted to opt out of the Arbitration Provision by providing MBNA with written notification by January 25, 2000. (Simpkins Aff. at 3, ¶ 6; Amendment at 1). To track the identity of cardholders who opted out, MBNA created an electronic spreadsheet of their account numbers (the "Opt Out File"). (Simpkins Aff. at 3, ¶ 8). MBNA also noted the "opt out" in these cardholders' customer information files. (*Id.*). Neither Samadi's cardholder customer information file nor the Opt-Out File indicates that Samadi opted out of the Arbitration Provision. (*Id.* at 4, ¶ 9).

The Arbitration Provision in the Amendment states that "[t]his arbitration agreement is made pursuant to a transaction involving interstate commerce." (Amendment at 1). The

Arbitration Provision does not limit the remedial relief the arbitrator may provide; rather, the "arbitrator shall follow existing substantive law to the extent consistent with the FAA and applicable statutes of limitation and shall honor any claims or privileges recognized by law." (*Id.* at 1-2). It also contains a severability provision, which states "[i]f any part of this Arbitration Section is found to be invalid or unenforceable under any law or statute consistent with the FAA, the remainder of this Arbitration Section shall be enforceable without regard to such invalidity or unenforceability." (*Id.* at 2). The Arbitration Provision limits the arbitration fees that can be charged to Samadi to an amount equal to his hypothetical court costs if his claims were litigated in state court. (*Id.* at 1).

MBNA subsequently charged off the amounts owed on Samadi's account and sold its rights in the account to a third party. (R1-1-11, 13, 14 at ¶¶ 40, 44, 48 and Ex. J at 3). Some time thereafter, Samadi sued MBNA and others in the United States District Court for the Southern District of Georgia. (R1-1). Samadi's Complaint alleged violations of various state and federal laws including the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, Consumer Credit Protection Act, 15 U.S.C. § 1601, *et seq.*, Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, "Georgia Fair Credit Extension Act,"[3] and Georgia Fair Lending Act, GA. CODE ANN. § 7-6A-1, *et seq.* (R1-1 at ¶¶ 1, 59). MBNA timely filed an Answer denying liability to Samadi and asserting numerous specific defenses, including the mandatory arbitration provision. (R1-3-7, 10 at ¶¶ 33, 44).

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3. Samadi provided no statutory cite for this legislation, and the undersigned counsel could not find any Georgia statute titled "Georgia Fair Credit Extension Act."

On May 6, 2005, MBNA filed a motion to stay the case and to compel arbitration based on the Arbitration Provision in the Agreement and, accordingly, all discovery ceased. (R1-17). Attached to the motion to compel was the affidavit of Margaret Simpkins, a vice president of MBNA. (R1-17). Copies of the motion to compel (including the Simpkins Affidavit) and the brief in support were served on Samadi on May 6, 2005, by U.S. Mail. (R1-17, R1-18). MBNA notified Samadi telephonically on Sunday, May 8, that the motion to compel had been filed and transmitted a copy of the motion to compel and supporting brief to Samadi via facsimile no later than May 9. (R2-1-15 at lines 15-21; R2-1-16 at lines 6-7).

The district court initially scheduled a hearing on the motion to compel before the Magistrate Judge for May 18, 2005. (R1-20). The docket indicates that Samadi and MBNA were notified of the initial hearing telephonically on May 9. (Docket #20). The district court subsequently rescheduled the hearing for June 1, 2005. (R1-21). The day before the hearing on the motion to compel, Samadi filed a document objecting to the motion to compel and requesting injunctive relief.[4] (R1-22, R1-23). In his objection, Samadi argued that he had not agreed to arbitrate. (*Id.*). Samadi has never disputed that the Agreement provides a procedure for amending it through notice and failure to opt out, but he denies that he received the notice. (Samadi Aff. attached to R1-22 and R1-23). As evidence, however, he offered only

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4. Referring to Samadi's request for injunctive relief, the Magistrate Judge wrote that "the Court notes that Samadi has not explained just what relief he seeks or why he is entitled to it; rather, the motion seems chiefly aimed at expressing Samadi's distaste for arbitration." (R1-26-8, n.10).

his own affidavit in which he merely claimed that he did not receive notice of the amendment from MBNA. (*Id.*).

At the June 1, 2005, hearing the parties presented arguments based upon the affidavits and the law. (R2-1). Neither party requested an evidentiary hearing (*see, generally*, Docket), nor offered any oral testimony at the hearing. (R2-1). The day after the hearing, Samadi filed a motion to strike the Simpkins Affidavit. (R1-25). He argued that the district court should strike the affidavit because Ms. Simpkins did not testify at the hearing. (*Id.*).

In his Report and Recommendation, the Magistrate Judge found that the Agreement requires arbitration of Samadi's claims and recommended that the case be dismissed without prejudice. (R1-26). After a careful *de novo* review of the file, on July 8, 2005, the district court adopted the Magistrate Judge's Report and Recommendation as the opinion of the district court. (*Id.*). The district court denied Samadi's motion to strike and request for injunctive relief, and it dismissed the case without prejudice. (R1-30).

Samadi appealed the district court's decision to the Eleventh Circuit Court of Appeals. In its opinion, the Eleventh Circuit noted that under the FAA, general state law contract principles apply to arbitration agreements. *Samadi v. MBNA Am. Bank, N.A.*, 178 Fed. Appx. 863, 865 (11th Cir. 2006). The court determined that under Georgia's conflict of law rules, Delaware law would apply because the parties' Agreement designated Delaware law, and no contrary public policy had been identified. (*Id.*). Delaware law explicitly permits banks to amend a revolving credit plan agreement via notice to the borrower. (*Id.* at 865-66). Further, Delaware courts have enforced the same arbitration provision when

notice was sent out in the same manner as was Samadi's notice. (*Id.* at 866). Thus, the Eleventh Circuit concluded that under Delaware law, Samadi was bound by the Arbitration Provision and affirmed the district court's dismissal of the case without prejudice.

Samadi then filed a petition for writ of certiorari in this Court on July 20, 2006.

REASONS FOR DENYING THE PETITION

A. The Eleventh Circuit's Decision Does Not Conflict With Any Decision of This Court or of Any Other Court of Appeals

The FAA requires that arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Pursuant to the FAA's dictates, this Court has repeatedly enforced agreements to arbitrate federal statutory claims. *See, e.g., Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000) (claims under Truth in Lending Act and Equal Credit Opportunity Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act). Samadi has not identified a single Supreme Court decision with which the Eleventh Circuit's opinion conflicts, nor has the undersigned counsel found any such case.

The Eleventh Circuit's decision is also consistent with similar cases from other jurisdictions. For example, in *Edelist v. MBNA America Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001), the Superior Court of Delaware held that what appears to be the same arbitration provision, communicated to the cardholder in the same way, was valid and enforceable under Delaware law. *Id.* at 1261. A number of other courts have also upheld the same MBNA arbitration provision and noticing method. *See, e.g., Lloyd v. MBNA America Bank, N.A.*, 27 Fed. Appx. 82 (3d Cir. 2002) (MBNA's Credit Card Agreement was properly amended and arbitration provision was binding on the parties); *Joseph v. MBNA America Bank, N.A.*, 148 Ohio Ct. App. 3d 660, 775 N.E.2d 550 (2002); *Jaimez v. MBNA America Bank, N.A.*, No. 05-2478, 2006 U.S. Dist. LEXIS 7526 (D. Kan. Feb. 27, 2006); *Blanchard v. MBNA America Bank, N.A.*, No. 05-81, 2005 U.S. Dist. LEXIS 18450 (W.D.N.C. Aug. 9, 2005); *Mackey v. MBNA America Bank, N.A.*, 343 F. Supp. 2d 966 (W.D. Wash. 2004). Still more courts have enforced amendments to credit card agreements of other credit card companies that were made and noticed in a manner similar to that of MBNA. *See, e.g., Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Grasso v. First USA Bank*, 713 A.2d 304 (Del. Super. Ct. 1998); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff'd mem.*, 34 Fed. Appx. 964 (5th Cir. 2002); *Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457 (S.D.N.Y. 2004). Again, Samadi has not cited any contrary authority from other circuits.

Samadi does cite several Eleventh Circuit decisions, and apparently argues that these cases are inconsistent with the Eleventh Circuit's opinion here. Samadi is incorrect; the panel's opinion is firmly rooted in established Eleventh Circuit and Supreme Court precedent. Moreover, even if the

decision below departed in some way from other Eleventh Circuit cases (which it does not), the proper recourse would be a petition for rehearing in the Eleventh Circuit rather than for a writ of certiorari. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

B. Most of the Issues Listed in Samadi's Petition Have Been Waived Due to Samadi's Failure to Raise Them Below

Samadi lists eleven questions at pages 3-4 of his petition. Few, if any, of these issues were raised below. Samadi's briefs to the Eleventh Circuit (broadly construed) contended that Delaware law should not apply; that the Arbitration Provision in the Agreement should not be enforced; and that the district court should not have considered the Simpkins Affidavit in connection with MBNA's motion to compel arbitration. To the extent Samadi attempts to raise any constitutional arguments or other issues in this Court, he has waived them by failing to argue them below. *See Powell v. Nevada*, 511 U.S. 79, 85 (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

C. In Any Event, the Eleventh Circuit's Decision Was Correct

This case presents a straightforward contract dispute that is governed by clear-cut Delaware law. The parties' Agreement provided that Delaware law would apply. (Agreement at 8). "A federal district Court is bound to apply the conflict of laws rules prevailing in the forum state."

Judge v. Am. Motors Corp., 908 F.2d 1565, 1577 (11th Cir. 1990). Absent contrary public policy, Georgia courts will normally enforce a contractual choice-of-law provision. *Nationwide Logistics, Inc. v. Condor Transp., Inc.*, 606 S.E.2d 319, 322 (Ga. Ct. App. 2004).

Under Delaware law, "a bank may at any time" amend a revolving credit plan agreement "in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties." Del. Code Ann. Tit. 5, § 952(a). Arbitration is specifically listed as one of the terms of an agreement that may be altered. *Id.* "Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower." *Id.*[5]

MBNA fully complied with 5 Del. C. § 952(a) by mailing the Amendment in December 1999. (Simpkins Aff. at 2, ¶ 5). The Amendment informed Samadi that he had the right to opt out of the Arbitration Provision by giving notice to MBNA by January 25, 2000. (*Id.* at 3, ¶ 6; Amendment at 1,

5. Georgia's similar statute also permits credit card companies to amend a credit card agreement upon written notice. Official Code of Georgia Annotated § 7-5-4(c) provides that a credit card company

> may, as specified in the written agreement governing a credit card account, modify in any respect any terms or conditions of such credit card account, upon such prior written notice of such modification as specified by the terms of the written agreement governing the credit card account or by the Truth in Lending Act.

2). Samadi did not opt out, and the Arbitration Provision became binding on February 1, 2000. (Amendment at 1). Samadi used the credit card after the Arbitration Provision's effective date. (*See, e.g.*, R1-1 at 6, 8, ¶¶ 22, 30). Thus, Samadi was required to arbitrate his dispute with MBNA.

The courts below also correctly held that Samadi failed to rebut the presumption of receipt created by the Simpkins Affidavit. It is settled law that an item properly mailed establishes the rebuttable presumption of receipt. *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"); *Konst v. Florida E. Coast Ry.*, 71 F.3d 850, 851-52 (11th Cir. 1996); *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992); *Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939 (10th Cir. 1987); *Meckel v. Continental Resources Co.*, 758 F.2d 811 (2d Cir. 1985). The presumption is established, as in this case, when there is evidence of the office procedures regarding mail transmission and receipt of other mail at the same address. *See, e.g.*, *Kerr v. McDonald's Corp.*, 427 F.3d 947, 952 (11th Cir. 2005); *Meckel*, 758 F.2d at 817; *Wells Fargo Bus. Credit v. Ben Kozloff, Inc.*, 695 F.2d 940, 944 (5th Cir. 1983). The Simpkins Affidavit details MBNA's procedures in maintaining and updating its customer records; how it enters notations when addresses change or mail is returned as undeliverable; how it established and abided by procedures to track cardholders that chose to opt out of the Arbitration Provision; and how the Amendment was mailed by MBNA's agent. Exhibits to Samadi's Complaint show that Samadi received mail at the same address to which the Amendment was mailed and during the same time period that the Amendment was mailed.

(R1-1, Ex. G at 1, 2 (showing statements mailed to Samadi's Grovetown address immediately before and after December 20, 1999)). This is sufficient to establish the rebuttable presumption that Samadi received the Amendment via U.S. Mail.

Samadi's mere denial of receipt was insufficient to rebut the established presumption; Samadi was required to provide proof that made the presumption that the sender mailed the item unreasonable. *Meckel*, 758 F.2d at 817; *Marsh*, 103 F. Supp. 2d at 919. Samadi failed to make this showing and therefore failed to rebut the presumption that he received the Amendment. *Mackey*, 343 F. Supp. 2d at 969, 970; *Marsh*, 103 F. Supp. 2d at 919; *Edelist*, 790 A.2d at 1254.

This analysis is not altered by Samadi's argument that the district court should not have considered the Simpkins Affidavit. The Eleventh Circuit was correct when it held the district court did not err when it considered the Simpkins Affidavit in conjunction with MBNA's motion to compel arbitration. Samadi moved to strike the Simpkins Affidavit solely on the grounds that he was denied an opportunity to cross-examine Ms. Simpkins. (R1-25-1-2). Samadi did not allege the Simpkins Affidavit was defective or deficient on its face nor that it was submitted improperly or in contravention of any rule or law. Samadi provided absolutely no basis for striking the Simpkins Affidavit, and the district court correctly denied his motion.

Even if Samadi's motion to strike were construed as a claim that the Magistrate Judge abused his discretion in deciding MBNA's motion to compel without holding an evidentiary hearing, the Eleventh Circuit was correct. Federal Rule of Civil Procedure 43(e) provides that "[w]hen

a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." Neither party requested an evidentiary hearing. (*See, generally*, Docket). A magistrate judge does not abuse his discretion when he or she decides a motion "on the basis of affidavits and other documents when neither party makes a timely and unequivocal request for an evidentiary hearing." *Sunseri v. Macro Cellular Partners*, 412 F.3d 1247, 1251 (11th Cir. 2005). Accordingly, the Eleventh Circuit was correct when it held the district court did not abuse its discretion in relying on the Simpkins Affidavit.

In summary, the courts below correctly interpreted and followed applicable state and federal law. Samadi has identified no error of fact or law that would merit a grant of certiorari.

CONCLUSION

Samadi has not established any compelling reason for this Court to grant his petition for writ of certiorari. Accordingly, MBNA respectfully requests that the petition be denied.

Respectfully submitted,

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